Office - Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-565

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

COMMONWEALTH OF MASSACHUSETTS,
Petitioner.

V.

PAUL DONOVAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF OF THE RESPONDENT IN OPPOSITION

RICHARD J. HAYES*
BROWNLOW M. SPEER
COMMITTEE FOR
PUBLIC COUNSEL SERVICES
Public Counsel Division
80 Boylston Street
Boston, Massachusetts 02116
(617) 482-6212

*Counsel of Record

QUESTION PRESENTED

Whether the holding of this Court in Moore v. Illinois, 434 U.S. 220 (1977), should be overruled.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISION INVOLVED.... 2

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT

THIS CASE IS ENTIRELY CONTROLLED BY THE HOLDING OF THIS COURT IN MOORE V. ILLINOIS, AND NO REASON HAS BEEN SHOWN BY THE PETITIONER AS TO WHY CERTIORARI SHOULD BE GRANTED TO REVIEW IT..... 3

CONCLUSION..... 6

TABLE OF AUTHORITIES

Cases

Commonwealth v. Donovan,
392 Mass. 647,
467 N.E.2d 198 (1984).....2, 4

Moore v. Illinois,
434 U.S. 220 (1977).....3, 4

Constitutional Provision

United States Constitution,
Sixth Amendment.....3, 4

Other Authority

Supreme Court Rule 17.....5

NO. 84-565

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

COMMONWEALTH OF MASSACHUSETTS,
Petitioner.

V.

PAUL DONOVAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The respondent is not dissatisfied with the petitioner's citation of the opinions below.

JURISDICTION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The respondent is not dissatisfied with the petitioner's statement of the constitutional provision involved.

STATEMENT OF THE CASE

The respondent relies on the facts set forth in the opinion of the Massachusetts Supreme Judicial Court in Commonwealth v. Donovan, 392 Mass. 647, 467 N.E.2d 198 (1984), which appears as Appendix A to the petition for a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

THIS CASE IS ENTIRELY CONTROLLED BY THE HOLDING OF THIS COURT IN MOORE V. ILLINOIS, AND NO REASON HAS BEEN SHOWN BY THE PETITIONER AS TO WHY CERTIORARI SHOULD BE GRANTED TO REVIEW IT.

In Moore v. Illinois, 434 U.S. 220 (1977), this Court declared the "strict rule" (id. at 232) that, in a criminal trial, the prosecution cannot buttress its case-in-chief by making use of testimony as to a pretrial identification made in violation of the accused's Sixth Amendment rights. Id. at 231. Such a violation of the Sixth Amendment occurs when a corporeal identification procedure is conducted after the initiation of adversary judicial criminal proceedings and in the absence of the accused's counsel. Ibid.

In the case at bar, after the commencement of adversary judicial criminal proceedings against Paul Donovan, and

without advising Donovan's counsel, the investigating police officer obtained a pretrial identification of Donovan as the perpetrator of the assault charged against him from Pablo Jaime, who was one of the witnesses to the assault. At trial, despite Donovan's timely Sixth Amendment challenge to the introduction of evidence of this uncounselled pretrial identification (motion hearing transcript, vol. 2, p. 71; Record Appendix, pp. 18-19), both Jaime and the investigating officer testified to it before the jury. See Commonwealth v. Donovan, 392 Mass. 647, 648, 467 N.E.2d 198, 199 (1984). The case is entirely controlled by Moore v. Illinois, supra, and the Massachusetts Supreme Judicial Court correctly so held. See Donovan, 392 Mass. at 649-651, 467 N.E.2d at 200-201.

The petitioner has shown no reason

why certiorari should be granted in this case. It has made no showing that the Massachusetts Supreme Judicial Court decided the federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals; nor has it shown that the Massachusetts Supreme Judicial Court decided a question of federal law which has not been settled by this Court or decided the federal question in a way in conflict with applicable decisions of this Court. See Supreme Court Rule 17.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL DONOVAN

By his attorneys,

RICHARD J. HAYES*
BROWNLOW M. SPEER
COMMITTEE FOR
PUBLIC COUNSEL SERVICES
Public Counsel Division
80 Boylston Street
Boston, Massachusetts 02116
(617) 482-6212

*Counsel of Record